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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF OREGON
8 PORTLAND DIVISION
9

10 ALANDER LEVEEN JACOB,

11 Plaintiff,

12 v.

13 UNITED STATES PROBATION

14 DEPARTMENT FOR THE DISTRICT OF

15 OREGON; CHIEF U.S. PROBATION

16 OFFICER JOHN BODDEN; and U.S.

17 PROBATION OFFICER KEVIN

18 MCGLOTHEN,

19 Defendants.
20
21

No. 3:18-cv-01489-SAB

**ORDER DISMISSING
COMPLAINT; DENYING
MOTION FOR PRELIMINARY
INJUNCTION AND
TEMPORARY RESTRAINING
ORDER**

22 Before the Court is Plaintiff's Motion for Preliminary Injunction and
23 Temporary Restraining Order, ECF No. 5. The motion was heard without oral
24 argument.

25 Plaintiff filed a *pro se* complaint on August 13, 2018, bringing two claims
26 under 42 U.S.C. § 1983. ECF No. 1. He requested special counsel and also
27 requested a preliminary injunction. *Id.* Plaintiff is seeking general damages in the
28 amount of \$17,800,000.00; special damages in the amount to be determined;

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1 punitive damages against each Defendant in the amount of \$1,000,000.00, as well
2 as cost of suit and reasonable fees. *Id.*

3 On September 5, 2018, Plaintiff filed a Motion for Preliminary Injunction
4 and Temporary Restraining Order. ECF No. 5. Plaintiff indicates that he furnished
5 a copy of the Civil Rights Complaint with the appropriate U.S. Marshal forms for
6 service. There is nothing in the record to indicate Plaintiff sought or received
7 authorization to have the U.S. Marshals Service serve his Complaint or his Motion.

8 28 U.S.C. § 1915(e)(2) provides:

9 (2) *Notwithstanding any filing fee*, or any portion thereof, that may
10 have been paid, the court shall dismiss the case at any time if the court
determines that—

11 (A) the allegation of poverty is untrue; or

12 (B) the action or appeal—

13 (i) is frivolous or malicious;

14 (ii) fails to state a claim on which relief may be granted;

15 or

16 (iii) seeks monetary relief against a defendant who is
immune from such relief.

(emphasis added).

17 Section 1915(e) Review

18 Before it rules on Plaintiff's Motion for Preliminary Injunction, the Court
19 has determined that it is necessary to conduct a § 1915(e) review.

20 Dismissal for failure to state a claim under § 1915(e)(2) incorporates
21 the standard for failure to state a claim under Federal Rule of Civil
22 Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).
23 To survive § 1915 review, a complaint must “contain sufficient factual
24 matter, accepted as true, to state a claim to relief that is plausible on its
25 face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

26 When reviewing a motion to dismiss for failure to state a claim upon
27 which relief can be granted, a court takes the factual allegations in the
28 complaint as true and construes them in the light most favorable to the

1 plaintiff. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
2 1988). On the other hand, mere legal conclusions, “are not entitled to the
3 assumption of truth.” *Iqbal*, 556 U.S. at 679. “Dismissal can be based on the
4 lack of a cognizable legal theory or the absence of sufficient facts alleged
5 under a cognizable legal theory.” *Balistreri*, 901 F.2d at 699.

6 “In civil rights cases where the plaintiff appears pro se, the court must
7 construe the pleadings liberally and must afford plaintiff the benefit of the
8 doubt.” *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th
9 Cir. 1988) (quotation omitted).

10 **42 U.S.C. § 1983**

11 42 U.S.C. § 1983 creates a cause of action against a person who, acting
12 under color of state law, subjects another to the deprivation of rights guaranteed by
13 the Constitution. 42 U.S.C. § 1983. Under § 1983, a plaintiff must demonstrate that
14 each named defendant personally participated in the deprivation of his rights. *Jones*
15 *v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). “A person ‘subjects’ another to the
16 deprivation of a constitutional right, within the meaning of section 1983, if he or
17 she does an affirmative act, participates in another’s affirmative acts, or omits to
18 perform an act which he is legally required to do that causes the deprivation of
19 which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)
20 (citation omitted). “The requisite causal connection can be established not only by
21 some kind of direct personal participation in the deprivation, but also by setting in
22 motion a series of acts by others which the actor knows or reasonably should know
23 would cause others to inflict the constitutional injury.” *Id.* (citation omitted).

24 Section 1983 provides a federal cause of action, but does not provide
25 a statute of limitations for bringing such an action. *Wallace v. Kato*, 549
26 U.S. 483, 387 (2007). Consequently, federal law looks to the law of the State
27 in which the cause of action arose. *Id.*

28 **Plaintiff’s Complaint**

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1 Plaintiff indicates that “[t]his action arises from the United States
2 Probation Department on September 12, 2011, openly conceding ‘that on the
3 date of February 20, 2001, the United States Court incorrectly applied the
4 1998 Guidelines Manual during sentencing.’ ECF No. 1. Oregon’s two-year
5 statute of limitations for personal injury actions applies to actions under 42
6 U.S.C. § 1983. *Cooper v. City of Ashland*, 871 F.2d 104, 105 (9th Cir.
7 1989).

8 It is clear from the face of Plaintiff’s Complaint that the underlying
9 facts of the Complaint occurred outside the two-year statute of limitations
10 applicable to his § 1983 claims. Plaintiff filed this instant action on August
11 18, 2018, almost seven years after he received the letter from U.S. Probation
12 and over 17 years after he was sentenced. As such, Plaintiff’s claims fail to
13 state a claim upon which relief may be granted.

14 In addition, Plaintiff complains about action taken in the underlying
15 criminal proceedings, 3:98-cr-00076-BR. In that case, it appears Plaintiff
16 sought to reduce and remove his remaining term of supervised release. His
17 theory was that if the career offender guidelines were deemed
18 unconstitutionally vague pursuant to *Johnson v. United States*, __ U.S. __,
19 135 S.Ct. 3551 (2015), he would be eligible to receive the benefit of past
20 amendments that were made retroactive under Section 2D1.1, which are the
21 drug guidelines. Plaintiff argues that if he had been resentenced at the time
22 the Amended Judgment was entered, he would not be subject to any term of
23 supervised release. The amended judgment indicates that upon release from
24 imprisonment, Plaintiff is to serve a term of 5 years of supervised release.

25 Judge Brown denied the motion, relying on the parties’ settlement of
26 Plaintiff’s § 2255 petition, which resulted in him being sentenced to credit
27 for time served and released, as well as the United States Supreme Court
28 case of *Beckles v. United States*, __ U.S. __, 137 S.Ct. 886, 890 (2017),

1 which held that, because the Guidelines “merely guide the exercise of a
2 court’s discretion in choosing an appropriate sentence within the statutory
3 range,” they are not subject to vagueness challenges. *Id.* at 892.

4 While *Beckles* does not necessarily apply to Plaintiff’s case as he was
5 sentenced under the then mandatory guidelines, the Ninth Circuit recently
6 foreclosed Plaintiff’s arguments that his term of supervised release is illegal
7 based in *Johnson v. United States*. See *United States v. Blackstone*, __ F.3d.
8 __, 2018 WL 4344096 (Sept. 12, 2018 9th Cir.). In that case, the Ninth
9 Circuit held that *Johnson* did not recognize a new right applicable to the
10 mandatory Sentencing Guidelines on collateral review. *Id.* at 15. It noted,
11 however, that if at a later date the United States Supreme Court extends
12 *Johnson* to a sentence imposed at a time when the Sentencing Guidelines
13 were mandatory, a defendant may be able to bring a timely motion under §
14 2255. Plaintiff’s argument that his term of supervised release is
15 unconstitutional pursuant to *Johnson* and therefore the United States
16 Probation Department is precluded from enforcing his conditions of
17 supervised release is foreclosed by *Blackstone*. Therefore, to the extent this
18 is the theory of his § 1983 action, he has failed to state a claim upon which
19 relief can be granted.

20 Finally, Plaintiff has not alleged sufficient facts that set forth how the
21 individually-named Defendants violated his constitutional rights.

22 **Leave to Amend**

23 Unless it is absolutely clear that amendment would be futile, a *pro se* litigant
24 must be given the opportunity to amend his complaint to correct any deficiencies.
25 *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2002). Therefore, Plaintiff is granted
26 leave to file an Amended Complaint that meets the requirement of 28 U.S.C. §
27 1915(e).

28 Accordingly, **IT IS HEREBY ORDERED:**

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ORDER ~ 5**

1 1. Plaintiff's Complaint, ECF No. 1, is **DISMISSED**. Plaintiff is
2 granted leave to file an Amended Complaint, if he desires. An Amended Complaint
3 must be filed 2 weeks from the date of this Order. Failure to file an Amended
4 Complaint will result in dismissal of this action.

5 2. Plaintiff's Motion for Preliminary Injunction and Temporary
6 Restraining Order, ECF No. 5, is **DENIED**, as moot.

7 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
8 and forward copies to counsel.

9 **DATED** this 18th day of September 2018.

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15 Stanley A. Bastian
16 United States District Judge
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